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Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare

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SECURITY OF THE PERSON AND THE PERSON IN NEED: SECTION SEVEN OF THE CHARTER AND THE RIGHT TO WELFARE

Ian Morrison*

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Canadian Charter of Rights and Freedoms, s. 7.

The destruction of the poor is their poverty.

Proverbs 10:15

From the time of the enactment of the Charter, there has been speculation as to whether the guarantee of life, liberty and security of the person – particularly security of the person – could be used in some way to protect "welfare rights".[1] There is little chance that s. 7 will be interpreted as creating an absolute right to welfare.[2] However, in

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1 I will use the term "welfare rights" in this article to describe a social assistance recipient's interest in qualifying for and continuing to receive means-tested assistance aimed at providing the basic necessities of life (such as, in Ontario, Welfare and Family Benefits). The word "rights" in this context is not intended to have legal significance.

2 As Sandra Wain points out, substantive welfare rights were intentionally excluded from the Charter on the grounds that these were not the kinds of interests that the Charter was intended to protect: Wain, "The Impact of the Charter of Rights on Social Assistance" (1987), (Background paper prepared for the Ontario Social Assistance Review Committee) at 28 [unpublished]. Experience has shown that the intentions of the drafters is not an infallible guide to judicial interpretation (see *Reference Re S.94(2) of the Motor Vehicle Act (B.C.)* (1985), 23 C.C.C. (3d) 289 (S.C.C.), hereafter the *Motor Vehicle Reference*),

light of judicial interpretations of s. 7 suggesting that the right to life, liberty and security of the person protects a range of personal interests beyond mere freedom from detention and serious bodily harm, it is arguable that a more limited protection of welfare rights may be available under s. 7.

I will explore some aspects of this possible argument in this paper. I will suggest that there is a strong argument available that s. 7 allows for the protection of what I will call "contingent interests" – that is, interests in liberty or security of the person that depend for their enjoyment on positive law entitlements. I will argue from this premise that when a person in need has a reasonable and settled expectation of entitlement to benefits, the denial of benefits may affect interests of the kind protected by s. 7 in such a way as to constitute "deprivations" of those interests within the meaning of s. 7.

This subject engages some of the most contentious issues of Charter interpretation, including fundamental theoretical questions about the nature of the Charter and the rights protected, but I will not attempt to treat these questions in detail here.[3] This is not to suggest that judicial consideration of this topic would not include consideration of theories of rights, but it seems to me that any argument for the protection of welfare rights under s. 7 must include a detailed and plausible account of how such protection can be fitted into the existing jurisprudential framework. Therefore, I have tried in this article to minimize general discussion of political and legal theory in favour of an attempt to indicate how such an argument might be constructed with the jurisprudential tools available.

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but it seems almost certain that s. 7 will not be interpreted as imposing specific obligations on the state to provide benefits or any particular level of benefits. I have referred in this article to several of the up-to-date and very useful Research Reports prepared for the Social Assistance Review Committee. Copies of these and other materials prepared for the Committee are available from: Income Maintenance Branch, Ministry of Community and Social Services, Third Floor, Hepburn Block, Queen's Park, Toronto M7A 1E9

3 These issues have been examined by other commentators examining this same topic: see particularly Wain, *supra*, note 2; and Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988), 46 U. of T. Fac. Law Rev. 1.

A. THE LEGAL CONTEXT OF SOCIAL ASSISTANCE IN CANADA

State provision for the destitute has existed in the English speaking world for centuries. For most of the history of poor relief, its ideological framework in relation to theories of the role of the state has remained unchanged – it has been commented that the basic social attitudes of the Elizabethan Poor Laws, as reformulated and modified in the major nineteenth century English welfare reforms, "have formed a bedrock of shared suppositions about the nature of need (particularly for income) and its relief that seems almost unshakeable".[4] At the heart of these attitudes was the characterization of relief as a matter of largesse or charity, the primary responsibility of local government or private charities, informed by a fundamental distinction between "deserving" and "undeserving" poor.[5]

However, the characterization of welfare as charity (although still influential) has lost ground in the last few decades, in competition with a concept of welfare as a state obligation to the poor. The delivery of welfare today is characterized, far more than in the past, by formal government commitment to the provision of adequate social assistance and by the movement of concepts of welfare rights into mainstream legal (including judicial) discourse. This legal and political formulation of the interests of welfare recipients in terms of "rights" may be an important element of an argument that such interests are constitutionally cognizable under s. 7.

1. THE LEGISLATIVE COMMITMENT TO ASSISTING PERSONS IN NEED

A salient characteristic of modern Canadian welfare law is that it exists within a framework of formal undertakings by government to provide assistance, evidenced by international law commitments and the legislative schemes within which entitlements are defined and services delivered.

Canada has certain obligations under international law to provide basic social security. The right to basic social security is set out in

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4 Irving, "From No Poor Law to the Social Assistance Review: A History of Social Assistance in Ontario, 1791-1987" (1988) (Background paper prepared for the Ontario Social Assistance Review Committee) [unpublished] at 2.

5 See generally Irving, *ibid.*

Article 25 of the *Universal Declaration of Human Rights, 1948.*[6] The rights guaranteed thereunder are expanded upon in the *International Covenant on Economic, Social and Political Rights*[7] (to which Canada is a signatory), which requires states party to the covenant "to take steps...to the maximum of...available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all available means, including particularly the adoption of legislative measures". The Covenant recognizes, *inter alia*, the right of everyone to social security, to an adequate standard of living including food, clothing and housing, and to the fundamental right to be free from hunger.[8]

The most important federal legislation is the *Canada Assistance Plan* (CAP), adopted in 1966 after close consultation between the provinces and the federal government.[9] The Plan expressly recognizes two purposes, the immediate goal of providing assistance to persons in need and the longer range goal of minimizing "need" in Canadian society.[10]

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6 G.A. Res. 217A(III), U.N. Doc. A/810 (1948). Article 25 provides that:

> Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

7 G.A.Res. 2200 A (XXI), 21 U.N. GOAR, supp. (No.16) 49, U.N. Doc. A/6316 (1966).

8 For further discussion of the nature of the rights created by these documents and their possible relevance to Charter interpretation, see Wain, *supra*, note 2; and see generally Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 Can. Bar. Rev. 265.

9 R.S.C. 1970 c. C-1. For information about the legislative framework for the delivery of welfare services in Canada prior to the Plan and the circumstances around its drafting, see Dyck, "The Canada Assistance Plan: The Ultimate In Cooperative Federalism" 19 Can. Pub. Admin. 587; Bella, "The Provincial Role in the Canadian Welfare State: The Influence of Provincial Policy Initiatives on the Design of the Canada Assistance Plan, 22 Can. Pub. Admin. 439. See also Beatty, "Federal-Provincial Fiscal Arrangements: Their Impact On Social Policy And Current Prospects For Reform" (1988) 3 J.Law & Soc. Pol'y 36.

10 In the Preamble to the Plan it is stated that,

> "...the provision of adequate assistance to and in respect of persons in need and the prevention and removal of the causes of poverty and dependence on public assistance are the concerns of all Canadians."

The Plan provides for federal provincial cost-sharing with respect to assistance programs that meet the conditions set out by the Plan.

The administration of assistance is a provincial responsibility. In order to qualify for transfer payments provinces are required to enter into "agreements" as defined in the Plan.[11] Under an agreement, a province undertakes to do several things; for present purposes, the most important of which is the undertaking that the province "will provide financial aid or other assistance to or in respect of any person in the province who is a person in need described in section 2, in an amount that takes into account his basic requirements".[12] All provinces provide some sort of assistance to persons in need, and most define "need" in a manner substantially identical to the Plan definition. Provincial legislation varies; some provides that assistance "shall" be provided to eligible persons, while some provides that it "may" be provided. Most provinces make provision of some kinds of benefits discretionary.[13]

2. THE LEGALIZATION OF WELFARE RIGHTS

The second salient characteristic of modern welfare law I wish to point out is the trend towards the legalization of welfare rights. Within a relatively short period of time, legal discourse has moved from an almost total exclusion of the interests of welfare recipients to the treatment of these interests in the language of legal rights.

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11 The mandatory requirements of an agreement are set out in s. 6(2) of CAP.

12 S. 2(a). "Person in need" is defined in s. 2 as

> "..a person who, by reason of inability to obtain employment, loss of the principal family provider, illness, disability, age or other cause of any kind acceptable to the provincial authority, is found to be unable (on the basis of a [means test]...) to provide adequately for himself or for himself and his dependents or any of them."

13 An exhaustive analysis of provincial welfare legislation and its relation to the *Plan* requirements can be found in an as-yet-unpublished manuscript by Patrick Riley, reviewing Canadian welfare law. The situation is complicated because many provinces have more than one piece of social assistance legislation eligible for cost-sharing. For example, according to Riley, Quebec, New Brunswick, Ontario and P.E.I. impose a mandatory obligation on provincial officials to provide assistance. On the other hand, Alberta, British Columbia, Manitoba, Nova Scotia and Saskatchewan have legislation which provides that provincial authorities "may" provide assistance while municipalities "shall" provide assistance. However, since the *Plan* also requires that provinces provide "a procedure for appeals from decisions...with respect to applications for assistance or the granting or providing of assistance" (s. 6(2)), the discretion in question is a limited and structured one.

Traditionally, the direct interests of welfare recipients were simply not considered in the small amount of litigation surrounding welfare matters. In the few cases where issues relating to welfare entitlements arose directly, the characterization of welfare as pure charity was made explicit. For example, in *Cholak* v. *Wostok*, a 1944 case described by Patrick Riley as "the first modern welfare law case in Anglo-Canadian jurisprudence",[14] the plaintiff failed in an attempt to use *mandamus* to compel a municipal council to pay him welfare.[15] Despite the apparently mandatory wording of the statute in question, O'Connor J. held that the provision of welfare relief was a discretionary matter, and went on to comment:

> "It is now 342 years since the first legislation similar to sec. 251 was enacted and in all that time so far as I can find no person has brought such an action. If this action succeeds every indigent person who does not get the kind of maintenance he wants may sue."

Similar attitudes prevailed in the United States, where eligibility standards were construed as excluding those who did not qualify, rather than as creating an entitlement to benefits in those who did qualify, leaving governments with almost unreviewable discretion with respect to the granting of benefits.[16]

In the last few decades, however, there has been a marked shift in the nature of legal discourse about welfare rights. As noted above, the

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14 Riley, *supra*, note 13. There was in fact welfare-related litigation in Canada prior to 1944, but it was virtually never at the instance of a recipient seeking to enforce a personal right to receive benefits. It was generally concerned with attempts by a party who had provided assistance to recover from some other party who was allegedly responsible for the debt: e.g., see the cases summarized in 32 Can. Abr. (2nd) 549-554.

15 *Cholak* v. *Wostock*, [1944] 1 W.W.R. 139 (Alta.Q.B.), affd. [1944] 3 W.W.R. 256 (C.A.)

16 For a brief review of this position, see Rosenblatt, "Legal Entitlement and Welfare Benefits", in Kairys, ed., *The Politics of Law: A Radical Critique* (New York: Pantheon Books, 1982). The above passage from *Cholak* may be compared to the following passage from an American case, *Smith* v. *Board of Commissioners of District of Columbia* 259 F.Supp. 423, 424 (D.D.C.), cited by Rosenblatt, at 265:

> "Payments of relief funds are grants and gratuities. Their disbursement does not constitute payment of legal obligations that the government owes. Being absolutely discretionary, there is no judicial review of the manner in which that discretion is exercised."

concept of a "right" to the necessities of life appeared in international law after the second war.[17] Theoretical developments moved especially quickly during the 1960s, when "poverty" became an important political issue in the United States and Canada. The proposition that society had a duty to alleviate poverty and to provide the means of subsistence to the very poor became increasingly accepted in liberal thought, where – while still contentious – it seems firmly entrenched.[18] There has been a concomitant change in judicial perceptions of what is at stake in welfare matters. The American experience of the legalization of welfare rights is instructive in this regard. In the 1960's, academic attempts were made to reformulate the interests of recipients of economic benefits under government control in terms that would bring them closer to traditional legal concepts of "rights", the best known examples being the influential articles of Professor Charles Reich.[19] This shift culminated in the 1960s in the elevation of some welfare interests to the status of constitutionally protected rights. In its landmark decision in *Goldberg* v. *Kelly*, the U.S. Supreme Court held that statutory welfare entitlements constituted "property interests" within the meaning of the due process clauses, adopting almost without discussion Reich's theories.[20] The Court explicitly located its protection of welfare rights in what it conceived as the fundamental constitutional values of dignity and self-respect, stating:

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17 International law obligations do not ordinarily create "rights" enforceable at the instance of an aggrieved individual in domestic tribunals. However, there is authority that international law may be considered as non-binding authority for the interpretation of the Charter: see particularly the dissenting judgment of Dickson C.J.C. in the *Reference Re Public Service Employee Relations Act*, [1987] 3 W.W.R. 577.

18 The respectability (though not universality) in mainstream political philosophy of the idea that there is a social obligation to provide for those truly in need seems beyond question now. This proposition received eloquent endorsement in *Transitions: The Report Of The Ontario Social Assistance Review Committee* (Toronto: Queen's Printer for Ontario, 1988) (the "Thomson Report"), which seems to be the first time that such a position has been taken by a government commission in Ontario.

19 Reich, "The New Property" (1964) 73 Yale Law Journal 733; Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale Law Journal 1245.

20 *Goldberg* v. *Kelly*, 397 U.S. 254 (1969). The theoretical basis for the Court's conclusion that welfare entitlements were protected appears only in a footnote at p. 262 in which Reich's articles and conclusions are cited.

> "From its founding the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has seriously influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the social malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity".[21]

As one American commentator has remarked, "The thoroughness with which this premise that receipt of welfare benefits is a "right" of those in need and not merely a privilege or gratuity has been incorporated in our consciousness within such a short period of time is astonishing".[22]

Although the shift in legal discourse in relation to welfare rights has not been quite so dramatic in Canada, it has nevertheless been substantial. Provincial welfare legislation in which entitlement to benefits is couched in mandatory terms has been held to create an obligation to provide benefits, conferring a corresponding "right" to receive benefits on those who meet the eligibility requirements – not a remarkable proposition in itself, but a new one in relation to welfare rights.[23] It

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21 *Goldberg* v. *Kelly*, *ibid.* at 265.

22 Sard, "The Role of the Courts in Welfare Reform" (1988) 22 Clearinghouse Rev. 370.

23 See, for example, *Re Webb and Ontario Housing Corporation* (1978), 22 O.R. (2d) 257 (C.A.), in which it was held that it was "clear" that a person who met the eligibility requirements of either the *General Welfare Assistance Act* (Ont.) or the *Family Benefits Act* (Ont.) had a statutory right to receive assistance. In *Re Casford and Director of Social Services* (1983), 1 D.L.R. (4th) 175 (P.E.I.S.C.), it was held that the phrase "The Minister *shall* provide [benefits]" in the *Welfare Assistance Act* (P.E.I.) imposed an absolute obligation on the Minister to provide aid to a person in need. See also *Matalski* v. *Corcoran, Sharp and Administrator of the Motor Vehicle Accident Fund* (1985), 42 Alta.L.R. (2d) 265 (Q.B.). Also of interest is the recent Ontario Divisional Court decision in *Dennhardt* v. *Ontario (Ministry of Community and Social Services)* (1987), 45 D.L.R. (4th) 149, in which the Court held that the Ontario *Family Benefits Act* should be liberally construed, and that any doubt arising from the language should be resolved in favour of the claimant.

also seems probable that the interests of recipients in obtaining discretionary benefits, not grounded in mandatory statutory language, are much better protected by legal doctrine than in the past.[24] Even the established principle that the *Canada Assistance Plan* does not create enforceable rights on the part of welfare recipients was modified in *Minister of Finance of Canada* v. *Finlay*, in which a welfare recipient was granted standing as an interested citizen to challenge alleged provincial non-compliance with *CAP*. Just as importantly, courts have begun to advert to the reality of recipients' situations and the consequences of a denial of benefits.[26] There are also, of course, examples of cases reflecting the opinion that the receipt of welfare constitutes an abandonment of the civil rights enjoyed by the rest of society. Nevertheless, the changes outlined in this paragraph, in relation to historical treatments (or non-treatment) of the same issues, represent a new characterization of the place of welfare rights in Canadian law.

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24 In *Re Webb, supra,* note 23, the Ontario Court of Appeal held that a body administering rent subsidized housing was required to act "fairly" before determining to evict a tenant, although the Court was careful to point out that she had no statutory entitlement to subsidized housing. Increased judicial scrutiny of the exercise of discretionary powers is of course a major development of administrative law in the last couple of decades, illustrated by the decision of the Supreme Court in *Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police* (1978), 88 D.L.R. (3d) 671, relied on by the *Webb* Court.

25 *Minister of Finance of Canada* v. *Finlay* (1986), 33 D.L.R. (4th) 321 (S.C.C.). It had been held in several earlier cases that recipients had no standing to challenge directly alleged provincial non-compliance with the *Plan*, because federal-provincial undertakings did not create rights in recipients: see *Re Lofstrom and Murphy* (1971), 22 D.L.R. (3d) 120 (Sask.C.A.); *Alden* v. *Gagliardi* (1972), 30 D.L.R. (3d) 760 (S.C.C.); *Leblanc* v. *City of Transcona*, [1973] 6 W.W.R. 484 (S.C.C.). The Court upheld this rule in *Finlay* but nevertheless granted the plaintiff standing.

26 In a series of recent cases the Ontario Divisional Court has emphasized that what is at issue in welfare litigation are "the necessities of life": e.g., see *Willis* v. *Ministry of Community and Social Services* (1983), 40 O.R. (2d) 287; *Dowlut* v. *Commissioner of Social Services* (1985), 8 O.A.C. 136; *Re Pitts and Director, Family Benefits Branch* (1985), 51 O.R. (2d) 303. See also *Blackburn* v. *Social Assistance Review Board* (1987), 80 N.S.R. (2d) 30 (S.C.), where the Court held that welfare authorities had to act on "clear evidence" before taking "the drastic action of removing essential support for a person in need of benefits and her two children" (p. 35).

B. THE SCOPE OF THE RIGHTS PROTECTED BY SECTION SEVEN

Before considering in detail how deprivations of welfare benefits affect liberty and security of the person interests, I wish to consider two of the most basic objections that can be made to the protection of such interests under s. 7. These are: (1) that the interests at stake in this case are fundamentally "economic" or "property" rights, which are not protected under s. 7, and (2) that s. 7 cannot protect against the deprivation of a benefit that the state is not obliged to extend in the first place.

1. THE INTERPRETATION OF SECTION 7

Constitutional arguments should be constructed within the framework of the general principles of Charter interpretation enunciated by the Supreme Court. As summarized by Dickson C.J.C. in *R.* v. *Morgentaler*:

> "The goal of Charter interpretation is to secure for all people the full benefit of the Charter's protection"... To attain that goal, this court has consistently held that the proper technique for the interpretation of Charter provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the Charter is "to be understood, in other words, in light of the interests it was meant to protect"...[27]

To this end, the interpretation of a Charter right should be "a generous rather than a legalistic one".[28]

2. "ECONOMIC RIGHTS" AND THE PROTECTIONS AFFORDED BY SECTION 7

The first serious objection to the protection of welfare rights under s. 7 is the argument that welfare is an "economic right" and that such rights are not included in the right to life, liberty and security of the person.

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27 *R.* v. *Morgentaler, Smolling and Scott* (1988), 44 D.L.R. (4th) 385 (S.C.C.), at 398.

28 *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344.

a. Protection Of Interests With An Economic Component

Although the Supreme Court has not yet fully considered the question,[29] it seems indisputable that "economic" or "property" rights are not protected by s. 7.[30] Some courts have held, although not in the specific context of entitlement to welfare benefits, that even the capacity to satisfy basic human needs is an "economic" right and therefore excluded from s. 7.[31]

However, despite the many cases in which this proposition has been asserted, there has been little real attention paid to what these terms mean and how this exclusionary principle of interpretation should operate. The problem is that it is impossible to make a rigid distinction between economic and non-economic interests, because most kinds of human social activities have both economic and non-economic aspects and can be characterized differently depending on which aspect is emphasized. Assertions that interests are one or the other inevitably are in part assertions of a conclusion as to which aspect of the interest should be given prominence – an obviously result-oriented process in the context of s. 7 where the characterization of the interest determines whether it is eligible for constitutional protection or not.

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29 The only case in which such an issue has been addressed by the Court is *Edwards Books and Art Ltd.* v. *The Queen*, [1986] 2 S.C.R. 713, (the "Sunday closing" case). Dickson C.J.C. commented only that, "Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes." (at 786).

30 There are dozens of cases in which this proposition has been asserted: see, for example, *R.* v. *Robson* (1985), 19 D.L.R. (4th) 112 (B.C.C.A.); *Re Aluminum Co. of Canada Ltd. and The Queen* (1986), 55 O.R. (2d) 522 (Div.Ct.); *Smith, Kline and French Laboratories Ltd.* v. *A.G.*(Can.) (1986), 43 D.L.R. (4th) 584 (F.C.A.); *Zutphen Bros. Construction Ltd.* v. *Dywidag Systems International Ltd.* (1987), 35 D.L.R. (4th) 433 (N.S.C.A.); *Reference Re P.E.I. Land Protections Act* (1987), 40 D.L.R. (4th) 1 (P.E.I.C.A.).

31 E.g., see the judgment of Vancise J.A. of the Saskatchewan Court of Appeal in *Re Bassett and Government of Canada* (1987), 35 D.L.R. (4th) 53. It may be noted that this proposition was advanced in a case involving a physician's argument that he had a constitutionally protected right to practice, and would seem to go farther than necessary to dispose of that issue. Other cases have suggested the possibility that legislation that went so far as to endanger a person's capacity to earn enough to provide the necessities oflife might be caught by s. 7: see *Service Employees International Union* v. *Broadway Manors Nursing Home* (1983), 44 O.R. (2d) 392 (Div.Ct.), per O'Leary, J., reversed on other grounds (1984), 48 O.R. (2d) 226 (C.A.).

In order to argue that interests with a substantial economic component should nevertheless be protected under s. 7, it will be necessary to argue that the courts should look beyond the fact that the matter in question involves money or property as part of the transaction between the state and the individual affected, to examine the consequences of the transaction in relation to the kinds of interests clearly protected by s. 7. It may be argued that looking to the substance of the transaction rather than the form in which the transaction takes place is required by the obligation to give s. 7 a generous interpretation that will give full protection to the interests it was meant to protect.

The most important case providing direct support for this proposition is the recent decision of the British Columbia Court of Appeal in *Wilson* v. *Medical Services Commission.*[32] A five-judge panel of the Court held that liberty included the right to choose one's profession and to choose where to pursue it, and that this right was infringed by legislation which effectively denied doctors the opportunity to be paid for their services if they did not practice in a location assigned by the province. The Court agreed that s. 7 did not protect "pure" economic interests, but held that the interest at stake in that case was not a pure economic one. It was able to avoid the "economic rights" aspect of the issue by characterizing the interests at stake as being the liberty interest affected by the state action and by characterizing the economic nature of the state action, in effect, as the means by which these interests were adversely affected by the state.[33] Although it did

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32 Wilson v. Medical Services Commission of B.C. (5 August 1988), (B.C.C.A.) [unreported].

33 For example, the Court stated at p. 22:

> "The trial judge has characterized the issue as "right to work" [a purely economic question], when he should have directed his attention to a more important aspect of liberty, the right to pursue a livelihood or profession" [a matter concerning one's dignity and sense of self-worth].

And at p.23:

> "The economic component of the freedom which the doctors seek to assert is the right to be paid by or on behalf of the patient for such services as may be rendered. The problem with the impugned legislation is that the opportunity to pursue their profession, and the freedom of mobility in practice, can be denied by refusing to allow patients the right to have the doctor reimbursed under the [provincial health insurance] plan. The rights being asserted in this case are personal rights affecting the freedom and quality of life of

not use these terms, it distinguished between the subject matter of the deprivation and the instrumentality of deprivation more clearly than have most cases in which such issues have arisen.

It may be argued that this is a better approach to dealing with interests with an economic component than an approach which would exclude from protection all matters where money is directly at issue. Accepting that s. 7 should not be used to protect economic interests *per se*, courts should still be required to engage in a purposive analysis with respect to each interest sought to be included in s. 7, to determine whether protection of the interest would fulfil the intention of the s. 7 protection, notwithstanding that this might incidentally shelter some economic interests.

b. Welfare Rights

(i) Economic And Non-Economic Aspects

An analysis distinguishing between the subject matter and the instrumentality of deprivation would be particularly appropriate in the case of welfare. Although welfare obviously involves an economic component, the nature and purpose of welfare payments is unique. Denial or termination of welfare benefits is a deprivation of an expectation of an economic commodity but, as will be argued in more detail below, it is also a direct and serious threat to fundamental noneconomic interests, the protection of which is the direct purpose for provision of the economic commodity. The implication of these interests in the provision of benefits is sufficiently clear as to justify a further inquiry into the consequences of a deprivation of benefits.

(ii) The Relevance Of American Law

As noted above, welfare entitlements have been afforded some degree of protection in American constitutional law as a species of property rights. It is likely that this characterization would be relied on by those resisting the constitutional protection of welfare rights in Canada as support for the proposition that welfare involves "property rights" and should therefore be excluded from consideration under s. 7. However, it can be argued that insofar as the treatment of welfare

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individual doctors. The effect upon them of the alleged deprivations is personal and has far reaching implications. It is not a purely business interest which is affected."

rights in American law is relevant at all to s. 7, it affords as much support for inclusion of welfare protections as for exclusion."[34]

Analysis of this issue must start with recognition of the textual differences between s. 7 and the due process clauses of the American Bill of Rights. Although the latter expressly protects "property", which s. 7 does not, it does not include an express protection of security of the person. It may be argued that the considerations which inform the definition of welfare entitlements as a species of property in American constitutional law may be as convincingly argued to inform the definition of security of the person in s. 7. The idea of "property rights" is not a unitary concept in American law. As Sandra Wain points out, the protection of property rights serves a variety of different purposes or functions in American law, some of which are similar to those served by the protection of liberty and security of the person and some of which are not.[35] The issue, therefore, should not be whether a particular kind of interest is called a property right in American law. Rather, the inquiry should be, whether the interest is capable of falling within the scope of the phrase "life, liberty and security of the person" and whether the purpose for affording it constitutional protection is consistent with the purposes for protecting life, liberty and security of the person.

The purpose for treating welfare entitlements as a right and affording them constitutional protection in American law, as stated in *Goldberg* v. *Kelly*[36], is because by meeting the basic demands of subsistence, welfare fosters dignity and well-being and affords to the poor the opportunity to participate meaningfully in the life of the community. The means by which the Court extended constitutional protection was by accepting a novel theory of property in which certain kinds of statutory entitlements to benefits were deemed to be property. This result was not achieved because entitlements were considered to be property in the usual sense. In fact, it was in some ways a radical departure from traditional notions of property in American law which has itself caused many doctrinal problems entitlement theory has been criticised

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34 The issue of whether the American characterization of welfare entitlements as property rights should affect the treatment of this issue under the Charter has also been considered in some detail by Wain, *supra*, note 2, and Johnstone, *supra*, note 3. They also argue that this characterization should not influence the Canadian debate on this issue.

35 Wain, *supra*, note 2, pp. 49-51.

36 *Supra*, note 20.

for making the concept of property almost incoherent.[37] It may be argued, then, that the characterization of welfare as a property right in American law is a complicated and unsatisfactory way of protecting interests that can be protected more directly as aspects of security of the person under s. 7 – in other words, that welfare rights were protected not because they could easily be characterized as property rights, but because the interests at stake gave rise to a deep judicial conviction that these interests should be protected notwithstanding doctrinal difficulties. It may be argued that the purposes for protection of welfare rights in American law are equally compelling under the Charter.

3. THE "RIGHTS/PRIVILEGES" DISTINCTION AND THE RIGHT "TO BE LEFT ALONE"

a. The Protection Of Contingent Interests Under Section 7

The second major objection to the protection of rights of this nature is the argument that constitutional status should not be extended to a government benefit that the government is not obliged to provide, even if removing the benefit closely implicates liberty and security interests. State action to enhance these interests may be desirable, but a choice to discontinue such action cannot be seen as a deprivation of the interests themselves. This kind of argument is sometimes framed in terms of a "rights" vs. "privileges" distinction – in the absence of a positive constitutional obligation to provide benefits, benefits are a "privilege" rather than a "right", and s. 7 does not protect privileges.

The "rights/privileges" distinction is often associated with another limiting device in relation to s. 7, which is the concept that the basic nature of the right afforded by s. 7 is "the right to be left alone". This theory of the nature of s. 7 views the rights to liberty and security of the person as inalienable and inherent aspects of personhood that exist independently of state action. On this view, it is difficult to imagine how such rights could be founded in positive law entitlements. However, although these kinds of arguments have been made and accepted in many cases (not always explicitly), there is authority to the contrary.

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37 See "Statutory Entitlement and the Concept of Property" 86 Yale L.J. 695; and see generally Nowak, Rotunda and Young, *Treatise on Constitutional Law*, Vol.2, (West, 1986), for a general discussion of the development and decline of entitlement theory in American constitutional jurisprudence.

The "rights/privileges" distinction has been expressly rejected as a device for limiting the scope of the interests protected by s. 7. In the Supreme Court decision in *Singh* v. *Minister of Employment and Immigration,* three judges of a six-judge panel of the Supreme Court held that security of the person was at stake in procedures to determine whether an alien should be granted Convention refugee status under the *Immigration Act, 1976.*[38] One argument advanced against the application of s. 7 was that because aliens had no "right" to enter or remain in Canada, a refugee claimant could have no constitutional interest at stake in procedures to decide whether he would be allowed to remain. However, Wilson J. found that this was not a useful way of treating the problem, stating:

> "The creation of a dichotomy between privileges and rights played a significant role in narrowing the scope of the application of the *Canadian Bill of Rights*... I do not think this kind of analysis is acceptable under the Charter."[39]

The implication of rejecting the rights/privileges distinction is that interests protected by the right to life, liberty and security of the person can be constituted at least in part by positive law. In *Singh,* for example, the security interest at stake in the refugee proceedings – i.e., freedom from the threat of physical punishment or suffering – was founded in the statutory right of a Convention refugee not to be returned to a country where her life or freedom would be threatened. The result in the case seems to have depended on the legislative choice to create the conditions for this freedom by defining "refugees" and extending to them certain protections.[40]

Another example of a situation where the rights/privileges distinction has been abandoned in relation to s. 7 rights is the body of case law dealing with prisoners' rights. It seems fairly well settled that prisoners have s. 7 liberty interests at stake in decisions regarding con-

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38 *Singh* v. *Minister of Employment and Immigration* (1985), 17 D.L.R. (4th) 22 (S.C.C.). The other three members of the panel reached the same result on the basis of the *Canadian Bill of Rights* and did not consider the Charter issue.

39 *Ibid.* at 461.

40 Wilson J. in *Singh* emphasized elsewhere in the judgment the importance of the special statutory status of refugees as the foundation for the protection of their status: see pp. 462, 463. However, it is not absolutely clear from the judgment that she would not have reached the same conclusion even in the absence of s. 55 of the *Immigration Act.*

ditional release. It would obviously be possible to characterize conditional release as a mere privilege – and it was in fact so characterized under the *Canadian Bill of Rights*[41] – since the prisoner's absolute right to liberty has been forfeited for the duration of the sentence. However, this approach appears to have been definitively rejected under the Charter.[42]

It may be noted also that the "rights/privileges" distinction has been rejected in American constitutional law.[43]

If positive law rights can form the basis for protection of liberty and security of the person, then obviously the simplest version of the "right to be left alone" theory cannot stand. Although s. 7 may not require the state to act so as to enhance or protect liberty or security, it can protect against the deprivation of interests contingent upon such action. The

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41 See *Mitchell* v. *The Queen*, [1976] 2 S.C.R. 570, and Wilson J.'s discussion thereof in *Singh, supra*, note 38.

42 The Supreme Court of Canada has not yet decided whether rights in relation to parole and mandatory supervision and liberty within prison are protected by s. 7 (the first appeal to the Court on one of these issues was not decided – see *Howard* v. *Inmate Disciplinary Court, infra*), but virtually all the lower courts that have addressed the issue have held that liberty includes conditional liberties: e.g., see *Howard* v. *Inmate Disciplinary Court, Stony Mountain Institution* (1985), 45 C.R. (3d) 242 (F.C.A.), appeal quashed as moot (1981), 61 C.R. (3d) 387 (S.C.C.); *Re Evans* (1986), 30 C.C.C. (3d) 313 (Ont.C.A.); *Re Ross and Warden of Kent Institution* (1987), 34 C.C.C. (3d) 452 (B.C.C.A.), holding that s. 7 protects the accrued right to earned remission under parole legislation; *Re Caddedu* (1982), 40 O.R.(2d) 128 (H.C.); Lowe (1983), 149 D.L.R. (3d) 732 (B.C.S.C.); *Re Cadieux and Director of Mountain Institution* (1984), 13 C.C.C. (3d) 330 (F.C.T.D.), applying the same reasoning to the revocation of parole once granted. The rights/privileges distinction has appeared in cases involving more purely discretionary opportunities for conditional liberty, such as decisions regarding day parole, with inconclusive results: compare *Re O'Brien and National Parole Board* (1984), 17 C.C.C. (3d) 163 (F.C.T.D.) with *Re Staples and National Parole Board* (1985), 21 C.C.C. (3d) 260 (F.C.T.D.).

43 The "rights/privileges" distinction was expressly rejected by the U.S. Supreme Court in *Goldberg* v. *Kelly, supra*, note 20, apparently signalling a departure from traditional rights analysis. However, although it has been formally abandoned, versions of the argument continue to appear: see generally Nowak, Rotunda and Young, *Treatise on Constitutional Law*, Vol. 2, *supra*, note 37; Smolla, "The Re-emergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much" (1982) 35 Stanford Law Review 69; and see also Johnstone, *supra*, note 3, for a briefer discussion of these developments. This is perhaps an inevitable consequence of the inherent instability of entitlement theory as a theory of property.

state may not have an independently enforceable obligation to give sanctuary to refugees, or to release prisoners prior to the expiry of their sentences, or to provide universal medicare upon which doctors must for all practical purposes rely to receive income for practicing their profession. But, having undertaken to do these things which closely implicate fundamental interests, the state may be constitutionally constrained in how it treats the interests so created. What s. 7 protects is the right not to be deprived of these interests except in accordance with the principles of fundamental justice, including the right to be left alone to enjoy whatever contingent liberty and security interests are ultimately held to fall within the scope of the section's protection.

b. The Extent Of The Protection

If some contingent liberty and security interests can be protected under s. 7, the crucial issue is how these interests are to be identified and defined. Because s. 7 interpretation is still in its infancy and such interests have only been considered in a few situations, consideration of this issue must be very speculative. Nevertheless, I will make a few suggestions as to what kinds of arguments might be made in this regard.

(i) Identifying The Interests Protected

With respect to identifying the protected interests, it seems clear that in each case this will have to be done by examining the nature of the interests affected by withdrawal of the mediating factor that enhances or protects the interest, and the severity of the consequences of withdrawal – in other words, by looking at the substance of the transaction. Where the courts are being asked to protect directly something that is not itself a liberty or security interest (such as the right to get a government cheque), they will presumably demand that there be a close connection between the deprivation of that thing and interests that can clearly be characterized as liberty and security interests (although this proposition is complicated somewhat by the treatment of "psychological security" as a protected interest, as discussed below).

The precise connections between the deprivation of benefits and liberty and security interests will be considered in more detail below. For the purposes of this part of the argument it is sufficient to note that denial of subsistence benefits arguably poses an immediate and substantial threat to all of the core interests protected by s. 7. Welfare benefits should, therefore, at least be eligible for consideration as protected contingency rights under s. 7.

(ii) Defining The Interests Protected

The question of how to define the precise interest protected is more difficult. For present purposes, the most important question would seem to be whether the protection can extend beyond non-discretionary statutory entitlements. The cases discussed above have equated the scope of the protection afforded with the extent of the statutory entitlement in the particular case. If this represents the limits of the protection available in all cases, the effective result would be the same as that reached in American law under entitlement theory, although the route to the result would be slightly different.[44]

However, it may be argued that constitutional protection of contingency interests need not be defined precisely in terms of statutory entitlement. The following points may be considered in this regard. First, the fact that a particular kind of government benefit is provided through statutory procedures which allow for the exercise of discretion in granting the benefit may mean that there is no absolute statutory "right" to the benefit. However, the degree to which particular discretionary grants can be structured and constrained within statutory schemes and at common law is almost infinite. It can be said in all but the strictest of terms that people who meet the eligibility criteria for some kinds of discretionary benefits have a "right" to such benefits. Since the idea behind the protection of contingent interests is the protection of the liberty and security interests at stake, not the benefit itself, there would seem to be no good reason to condition this protection on a distinction between mandatory and discretionary statutory entitlements to the benefits.

Secondly, and more importantly, it may be argued that an essential part of what is being protected in the case of contingency interests is a person's reasonable and settled expectation in relation to fundamentally important personal interests – see particularly the discussion below of the protection of psychological integrity under s. 7. The expectation arises because the state has determined that protection or enhancement of the interest is important and has committed itself to so doing. Such expectations are clearest where there is an absolute statutory entitlement in relation to the interests, but there is no obvious reason why protection must be limited to such circumstances, where the undertaking and the purpose for the undertaking are clear.

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44 See Nowak et al., *supra*, note 37 at 234 ff., for a convenient summary of the problems of entitlement theory. For example, entitlement theory seems to restrict the protection afforded to benefits presently enjoyed, placing almost no procedural constraints on the initial decision to grant the benefits.

I suggested above that the legislative framework for the provision of social assistance in Canada could be characterized as a series of formal state commitments at the international, national and provincial levels to the provision of the means of subsistence to persons in need. It may be argued that, if welfare is held to be so closely related to fundamental s. 7 interests that it should receive protection as a contingency interest, the scope of the protection should be defined in relation to these undertakings and the definition of "person in need" and not simply in relation to whether provision is mandatory or discretionary.

C. DEPRIVATIONS OF "LIFE, LIBERTY AND SECURITY OF THE PERSON" IN THE WELFARE CONTEXT

Many important personal interests are implicated in complex ways in the provision and delivery of welfare benefits. Even if there are no *a priori* barriers to the protection of benefits under s. 7, it will still be necessary to show that a denial of access to benefits has such an adverse impact on interests that form part of the right to life, liberty and security of the person that it can be characterized as a deprivation.

1. GENERAL PRINCIPLES

Although the Supreme Court has now had occasion in several cases to consider s. 7, there has been no definitive statement of the scope of the right to life, liberty and security of the person. Section 7 has been described as protecting "these most basic rights...the deprivation of which 'has the most severe consequences upon an individual'",[45] but most of the judges of the Court have preferred, in the words of Dickson C.J.C., "not to attempt an all-encompassing explication of so important a provision as s. 7 so early in the history of Charter interpretation.[46] Nevertheless, some basic propositions can be asserted about the scope of the right.

It has been settled that the three elements of the right to life, liberty and security of the person are "independent interests, each of which must be given independent significance by the courts".[47] Contrary to one

45 The *Motor Vehicle Reference, supra,* note 2, per Lamer J. at 300-301, citing *Re Cadeddu and The Queen* (1982), 40 O.R. (2d) 128 (H.C.J.).

46 *Morgentaler, supra,* note 27, per Dickson C.J.C. at 397.

47 *Ibid.,* per Dickson C.J.C. at 398.

suggested interpretation of s. 7[48], it appears to be settled that more than purely physical interests are protected.[49] It has been held the rights specified in ss. 8 to 14 of the Charter are specific illustrations of the scope of s. 7, and are therefore a guide to the interpretation of the section.[50] Finally, there is authority for the proposition,that the interpretation of s. 7 should be informed by the values reflected in other parts of the Charter.[51]

2. SPECIFIC INTERESTS PROTECTED BY SECTION 7

a. Freedom Of Movement And Physical Integrity

There is no doubt that liberty, in the sense of freedom of movement, and security of the person, in the sense of bodily integrity and freedom from physical interference, are protected interests. The right of bodily integrity includes the right to seek and obtain the necessities of life and health – for example, the right of access without sanction to necessary medical care.[52]

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48 E.g., the Alberta Court of Appeal in *R.* v. *Neale,* [1986] 5 W.W.R. 577; and the Federal Court of Appeal in *Operation Dismantle* v. *The Queen* (1983), 3 D.L.R. (4th) 193, affirmed on other grounds (1985), 18 D.L.R. (4th) 481 (S.C.C.)

49 See the discussion below of the right to psychological integrity.

50 In the *Motor Vehicle Reference, supra,* note 2, Lamer J. stated that "Sections 8 to 14...in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person" (p. 549). Some of the interests at stake in these other sections clearly go beyond physical interests; for example, the right to be free from unreasonable search and seizure is founded on protection of fundamental privacy interests: see *Hunter* v. *Southam* (1984), 11 D.L.R. (4th) 641 (S.C.C.). In *Morgentaler, supra,* note 27, Dickson C.J.C. affirmed that principles developed in interpreting other legal rights could inform the content of the s. 7 right.

51 In *Morgentaler, supra,* note 27, Wilson J. adopted in relation to the interpretation of s. 7 (albeit the second branch rather than the first), the following comments of LaForest J. in *Lyons* v. *The Queen* [1987] 2 S.C.R. 309:"...the Charter protects a complex of interacting values...and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the Charter as a whole and, in particular, of the context of the other specific rights and freedoms it embodies".

52 *Morgentaler, supra,* note 27.

b. Psychological Integrity

It has also been established that the right to "security of the person" includes some degree of protection of psychological security.

In *Singh* v. *Minister of Employment and Immigration*[53], Wilson J. (Dickson C.J.C. and Lamer J. concurring), noting that a Convention refugee had a statutory right under the Act not to be removed from Canada to a place where his or her life or freedom would be threatened, held that "'security of the person' must encompass freedom from the threat of physical punishment as well as freedom from such punishment itself".[54]

The Supreme Court has also held that the fact of being under charge for a criminal offence impairs the right to security of the person, through "stigmatization of the accused, loss of privacy, stress and anxiety resulting from a number of factors, including possible disruption of family and social life and work, legal costs, uncertainty as to the outcome and sanction".[55]

Most importantly, in *Morgentaler* a majority of the Court held that psychological stress caused by the administration of abortion legislation was an aspect of security of the person deprived by the legislation in question. Dickson C.J.C. (Lamer J. concurring), held that:

> "...state interference with bodily integrity and serious state imposed psychological stress, at least in the criminal context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice."[56]

Beetz J. (Estey J. concurring), agreed that state-imposed psychological trauma in the context of that case constituted a deprivation of security of the person, but like Dickson C.J.C. left open the extent to which such interests might be protected where the trauma was not in part a consequence of a threatened criminal sanction.[57]

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53 *Supra*, note 38.

54 *Ibid.* at 460.

55 *R.* v. *Mills* (1986), 1 D.L.R. (4th) 161 (S.C.C.), per Lamer J. at 219, in the context of s. 11(b) of the Charter (right to trial within a reasonable time).

56 *Supra*, note 27 at 401.

57 *Ibid.* at 427.

Beetz J. also indicated agreement with the argument of McIntyre J., dissenting, that,

> "To invade the s. 7 security of the person, there would have to be more than state-imposed stress or strain. A breach of the right would have to be based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection."[58]

Wilson J., concurring, agreed that security of the person included the protection of psychological security, without suggesting any restrictions on the circumstances in which the right would be protected.

Thus, it is clear that s. 7 protects against some kinds of deprivations of psychological security caused by state action, but the scope of the protection is unsettled. The crucial question for present purposes is whether the right to psychological security is only protected in the "criminal context". The fact that this possibility was raised by four of the majority judges in *Morgentaler* suggests an understandable concern about the open-ended nature of the concept.[59] However, it may be argued that the "criminal context" restriction – whatever it might mean – is not an appropriate device for dealing with this concern. In *Morgentaler*, the relevant stress and anxiety did not flow from the fact of being charged with an offence, but from the consequences of denying or delaying access to safe and timely abortions, the primary security interest at stake in that case. The "criminal context" was simply the fact that the regulatory system was backed up by a threat of criminal

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58 *Ibid.* per McIntyre J. at 472. Beetz J. stated, at 428, "I agree with McIntyre J. that a breach of a right to security must be 'based upon an infringement of some interest which would be of such nature and such importance as to warrant constitutional protection' "; however, he concluded that "the protection of life or health is an interest of sufficient importance in this regard".

59 Unfortunately, none of the majority judges stated the basis for the possible restriction. However, McIntyre J., dissenting, expressed the obvious concern, stating (p.471):

> "It must, surely, be evident that many forms of government action deemed to be reasonable and even necessary in our society, will cause stress and anxiety to many, while at the same time being acceptableexercises of government in pursuit of socially desirable goals. The very facts of life in a modern society would preclude the entrenchment of such a constitutional right...It is hard to imagine a government policy or initiative which will not create significant stress or anxiety for some and, frequently, for many members of the community."

sanction. However, the criminal law is not the only means by which serious coercive pressure can be brought to bear on the individual and it would be unreasonable to suggest that criminal sanctions are invariably more severe in consequences than other forms of state action. Deprivation of welfare is as good an example as any – the wrongful deprivation of benefits may have far more serious consequences for a particular individual than the outcome of a minor criminal charge.

Furthermore, it may be argued that such a restriction does not fit comfortably into the jurisprudential framework for s. 7 analysis outlined above. The prevailing theory is that s. 7 expresses a general right, encompassing but not restricted to the scope of the rights enumerated in ss.8 to 14. It seems probable that at least some of these rights are applicable outside the criminal law context – for example, one would expect that the right to be free from cruel and unusual treatment includes a psychological component even in situations of civil detention. Also, Dickson C.J.C.'s position in *Morgentaler* seems incompatible with his position in *Singh*, a clear example of a threat to psychological security that did not arise in a criminal context.

In any event, *Morgentaler* only raised the issue and did not purport to impose such a limit. It may be argued that it would be more consistent with the principle of broad and liberal interpretation and the case law to determine the limits of the protection of psychological security by focussing on the substance of the interests at stake rather than the instrumentality of deprivation.

c. Social Integrity – The Right To Dignity And Self-Respect

There is no consensus in the cases as to the scope of the s. 7 right beyond physical and psychological security. Some lower courts have taken a very narrow view of the right (although these must be read in light of the Supreme Court jurisprudence discussed above), but many others have held or at least suggested that a broader range of interests may be protected. For the purposes of this article I will refer to these as "social integrity" interests.[60]

Analysis of the scope of s. 7 in this respect must take account of the "purpose" for the protection of the right to life, liberty and security of

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60 I do not mean to imply that the interests discussed in this section are necessarily of the same nature. I am using the term "social integrity" interests to distinguish these more contentious interests from the personal interests in physical and mental integrity discussed above.

the person. Although most justices of the Supreme Court have not undertaken such an analysis, Wilson J. has attempted to situate s. 7 rights within the central Charter value of "human dignity". In *Morgentaler*, she defined "dignity" in part as "a condition of self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life", and approved the proposition that:

> "...self-respect and contentment are...fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that fulfilment, he would suffer deprivation of his essential humanity."[61]

Other judges and commentators have made similar suggestions about the essential nature of the right to life, liberty and security of the person.[62]

The full extent of this possible broader protection remains unclear, because of differences in approach between lower courts. For example, the British Columbia Court of Appeal has adopted from American law the proposition that "'liberty' under the law extends to the full range of conduct which the individual is free to pursue".[63] The Ontario Court of Appeal has rejected a narrow "physical rights" interpretation of s. 7, but has been more cautious in its general statements about the nature of the right.[64] The Saskatchewan Court of Appeal

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61 *Morgentaler, supra,* note 27 at 435.

62 See, for example, *Beare* v. *R.* [1987] 4 W.W.R. 309 (Sask. C.A.), reversed Jan. 18, 1988, S.C.C.,(reasons to follow), wherein Bayda C.J.S. founded the right to life, liberty and security of the person in "the dignity and worth of the human person", which in his view encompassed "first, that threshold level of dignity and worth which defines humanness and which is the birthright of every individual regardless of societal perceptions of human worth and regardless of individual perceptions of selfworth; second, that dignity and self-worth that an individual derives from his own sense of self-respect" (p.319). See also Johnstone, *supra,* note 3.

63 *Wilson* v. *Medical Services Commission of B.C., supra,* note 32; *R.* v. *Robson* (1985), 19 D.L.R. (4th) 112 (B.C.C.A.).

64 The Ontario Court's only extended consideration of the meaning of "life, liberty and security of the person" is in *R.* v. *Morgentaler* (1985), 22 C.C.C. (3d) 353, affirmed by the Supreme Court on other grounds. The Court expressly rejected the narrow "physical freedom" interpretation of s. 7, and went on to suggest that:

seems to have adopted yet a different view.[65] Nevertheless, even if the case law is not unanimous with respect to the general purpose of the s. 7 protection, there is authority for the inclusion in s. 7 of a variety of different interests (unless the Supreme Court chooses to halt the development of the right in its present state, which seems unlikely). It is probable that privacy interests in family and personal relationships, such as interests in sexual relationships, family integrity and parent/child relationships, are protected to some extent.[66] It has also been held that the right to choose an occupation and the freedom to practice is a protected aspect of liberty – this holding is of particular interest here because it was specifically founded in the importance of this choice to the core interests of dignity and self-

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> "Some rights have their basis in common law or statute law. Some are so deeply rooted in our traditions and way of life as to be fundamental and could be classified as part of life, liberty and security of the person. The right to choose one's partner in marriage, and the decision whether or not to have children, would fall in this category, as would the right to physical control of one's person, such as the right to clothe oneself, take medical advice and decide whether or not to act on this advice."

65 *R.* v. *Beare, supra,* note 62. Although the Court's approach would seem to encompass a broad range of personal interests, its approach has led it to different conclusions from the B.C. Court of Appeal. For example, the Saskatchewan Court in *Ginther* v. *Sask Gov't Insurance,* [1984] 4 W.W.R. 738, summarily rejected an argument that the right to liberty protected the right to drive, a proposition accepted by the B.C. Court in one of the first s. 7 cases to reach it (see *R.* v. *Robson, supra,* note 63).).

66 For example, the Ontario Court of Appeal in *Morgentaler, supra,* note 64, suggested that s. 7 would protect some interests of this type. Similar suggestions have been made in other lower courts: e.g., see *Re T. and Catholic Childrens' Aid Society* (1984), 46 O.R. (2d) 347 (Ont.Prov.Ct. – Fam.Div.) (child protection proceedings); *Childrens' Aid Society of Halifax* v. *R.W. and M.B.* (No.2) (1987), 80 N.S.R. (2d) 341 (N.S.Fam.Ct.) (child protection proceedings); *Re J & C et. al.* (1985), 48 R.F.L. (2d) 371 (Ont.Prov.Ct. – Fam.Div.) (interests of natural parents in adoption proceedings); *B.M. & M.M.* v. *R. in Right of Alberta* (1985), 45 R.F.L. (2d) 113 (Alta.Q.B.) (discussing without deciding on the rights of foster parents in relation to foster children). But see contra: *Re Khalon* (1985), 23 D.L.R. (4th) 564 (F.C.T.D.); *Re Horbas and Horbas,* [1985] 2 F.C. 359 (T.D.); *Downes* v. *Minister of Employment and Immigration* (1986), 4 F.T.R. 215, holding (on the basis of the narrow view of s. 7) that various kinds of family interests were not protected. See also the judgments of Wilson J. in *Morgentaler, supra,* and *R.* v. *Jones* (1986), 31 D.L.R. (4th) 569 (S.C.C.) (dissenting), where she discussed the possible protection of these kinds of interests at some length. Issues relating to freedom in relation to sexual preference have arisen in a few cases but been avoided: see *Sylvestre* v. *The Queen* (1986), 30 D.L.R. (4th) 639 (F.C.A.); *Andrews* v. *Ontario (Minister of Health)* (Mar. 4, 1988), 9 A.C.W.S.(3d) 14 (Ont.H.C.).

respect, including the opportunity to play a contributing role in society.[67] Many of these interests have been held to be fundamental rights under the due process and equal protection doctrines in American constitutional law.[68]

Thus, the argument can be made that interests closely tied to the protection or affirmation of dignity and self-respect should also receive constitutional protection under s. 7.

3. DEPRIVATION OF LIBERTY AND SECURITY INTERESTS IN THE WELFARE CONTEXT

a. The Consequences Of Denial Or Termination Of Benefits

The basic purpose of welfare is to provide the means of survival to those with no other resources. This is both a goal in itself – the alleviation of the direct physical harm consequent upon extreme poverty – and in theory at least a means to the end of enabling recipients to participate in civil society.

> "Not having the simple necessities of life isolates people from their communities, adding a burden of stigma as well as reducing self-esteem, motivation and hope. Opportunities

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67 *Wilson* v. *Medical Services Commission of B.C., supra,* note 32. The Court relied in part on the judgment of Dickson C.J.C. in *Reference Re Public Service Employee Relations Act,* [1987] 3 W.W.R. 577 (S.C.C.), who stated that:

> "Work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."(p.618)

68 There is an enormous body of American law defining the kinds of interests deemed "fundamental" in constitutional theory. Two of the most important and influential general works analyzing this body of law are Nowak et al., *supra,* note 37, and Tribe, *American Constitutional Law* (Foundation Press, 1968). Speculation in the abstract about the precedential value of American constitutional jurisprudence is not a very useful exercise, particularly while the parameters of the s. 7 right remain so unclear. Some judges appear to be heavily influenced by American jurisprudence in s. 7 cases, for example, Wilson J., while others are not. In any event, to the extent that such case law is influential, American case law can be found supporting the protection of most of these kinds of interests.

> that do exist become beyond reach. Life is consumed by a perilous struggle to survive, to meet the most basic needs."[69]

Physical well-being is obviously at stake in the provision of social assistance. The intention of social assistance programs is to provide the minimum necessities of life to those unable to provide for themselves. Absence of the minimum necessities means, of course, an immediate threat of hunger, illness and lack of shelter. Furthermore, most recipients live far below any officially recognized "poverty line" and are in danger of suffering the long term physical ill effects of sustained poverty.[70] The termination of benefits that provide the means of maintaining a certain degree of well-being deprives the person of that degree of physical well-being.

Denial or termination of benefits also clearly affects psychological security. Deep poverty is itself a source of extreme and debilitating distress and anxiety.[71] Insofar as welfare creates some psychological security about the provision of basic needs, refusal or termination of benefits deprives the person in need of this security, causing anxiety and stress in relation to the provision of the basic needs for health and well-being, as graphically illustrated in the following excerpt from an application to appeal a decision terminating Family Benefits:

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69 *Thomson Report, supra,* note 18 at 13.

70 The health consequences of extreme poverty are explored in detail in Harding, "The Relationship Between Economic Status and Health Status and Opportunities" (1987) (Background paper prepared for the Ontario Social Assistance Review Committee) [unreported]. As summarized in the abstract to the report: "poor people (i) experience higher rates of premature death (ii) die younger (iii) have more illness and are ill more often [and] have fewer years of life that are disability free".

71 The stress of poverty and powerlessness has profound psychological consequences and has been identified as being itself a causal factor in diminished mental and physical health: see Harding, *op. cit., supra,* note 69. This relationship between psychological pressures and health is reminiscent of the situation in *Collin* v. *Lussier* [1983] 1 F.C. 218 (T.D.), in which it was held that a decision to transfer a prison inmate in ill health to a less desirable facility deprived him of security of the person, the Court stating:

> "...such detention, by increasing the applicant's anxiety as to his state of health, is likely to make his illness worse and, by depriving him of access to adequate medical care, it is in fact an impairment of security of the person."

The trial decision in *Collin* was reversed on appeal ([1985] 1 F.C. 124 (C.A.)), but this aspect of the holding was specifically approved by Wilson J. in *Singh, supra,* note 38, and Beetz J. in *Morgentaler, supra,* note 27.

> "Without a monthly Mother's Allowance cheque, I have no way to support me and my two children or to pay March's rent.
> I have already signed a paper saying that I am living by myself (with 2 children) and do not know why you have cut me off my allowance cheque.
> In the meantime I have to report to Welfare for help and I don't know what I am to do if they refuse me."[72]

In this context, it may be argued that decisions with respect to eligibility have the same kind of potential to affect psychological security as do decisions with respect to refugee status. In both cases a status created by law ("eligibility", "Convention refugee") confers legal rights which allow the person with the status some freedom from fear of the consequences which might otherwise ensue – this freedom from fear may itself be a constitutionally protected interest, even though the adverse consequences of its removal would not be directly attributable to government.

Finally, it seems obvious that denial of benefits to persons in need deprives them of whatever degree of dignity and selfrespect is gained from the minimal guarantee of freedom from want provided by receipt of benefits. In assessing the importance of welfare as protecting a minimum level of opportunity for social participation, the demographic composition of the recipient group is an important consideration. The poor are not a random selection of individuals who have fallen on hard times, but tend rather to belong to particularly vulnerable groups or groups traditionally disadvantaged in other ways – sole support single parents (usually women), the elderly (especially elderly women), the physically and mentally disabled, Native people and, most disturbingly, a high proportion of dependent children.[73] Their need for access to the means necessary to make social participation possible is doubly great.

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72 Reproduced in *Re Pitts and Director of Family Benefits Branch, supra,* note 26 at 304.

73 The relationship between poverty and receipt of social assistance is complex and has changed substantially over the years. A convenient and current overview of the situation in Ontario can be found in the *Thomson Report* (*supra,* note 18). One valuable aspect of the Thomson Report is that it identifies many of the common public misconceptions about the nature of welfare recipients, such as the erroneous beliefs that most people on welfare are unemployed, working age adults, or that welfare is seen by many recipients as a desirable alternative to work (see generally Chapter 2). For example, of the combined

The consequences of deprivations of welfare in this context may be tied more particularly to some of the specific interests identified above. As pointed out above, a large number of recipients are single mothers with dependent children. Welfare benefits provide the means for keeping such family units together in circumstances where this would otherwise be impossible in the absence of other resources. For the significant group of recipients who rely on welfare as an relatively short term source of emergency funds, enabling them to maintain themselves temporarily so that they can return to the work force without abandoning homes and communities, welfare must protect at least to some degree community and the opportunity of social participation.[74] Even where benefits are inadequate, the consequences of termination for those without other resources are worse than the consequences of continued receipt.

b. "Deprivation"

An issue that has received relatively little attention in the case law is the kind of causal connection between state action and impairment of liberty or security meant by the concept of deprivation in s. 7. It is clear, however, that there is a point at which the probability of impairment of a protected interest attendant upon a particular state action will not be sufficient to constitute a "deprivation" of those interests. In *Operation Dismantle* v. *R.*, Dickson C.J.C. stated:

> "Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain from those acts which *might* lead to consequences that deprive or threaten

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beneficiaries of welfare programs in Ontario in 1987, only 13.6% were considered employable, while the largest group of beneficiaries consisted of dependent children (31.7%). The disabled were 31.7% of recipients (17.2% of beneficiaries). Within groups identified by age or family status, of course, women and certain minority groups are more likely to suffer poverty. For example, national statistics recited by Harding (*supra*, note 69) indicated that single parent families headed by women were 4.5 times more likely to be poor than single parent families headed by men, the percentage of poor families headed by women had almost tripled from 1961 to 1985; and 70% of the elderly poor were women.

74 Persons deemed to be "employable" made up 13.6% of all welfare beneficiaries in Ontario in 1987. The Thomson Report noted that, contrary to widespread public belief, "about 40% of employable recipients remain on assistance for less than three months; the average for that group is about seven months": *Thomson Report, supra*, note 18, at 31-2.

> to deprive individuals of their life or security of the person".[75]

McIntyre J., dissenting in *Morgentaler*, objected in part to the inclusion of psychological security as a deprived interest in that case on the grounds that much of the anguish associated with an unwanted pregnancy and abortion was inherent and unavoidable and that it could not easily be determined the extent to which state action was responsible for the attendant stress and anxiety.[76]

The physical and mental health consequences described above might not follow with absolute certainty from a deprivation of welfare, but it seems clear there would be a high degree of probability in this regard – it could hardly be otherwise, since the consequences of deprivation are inherent in the definition of the benefit that is being deprived. The same is true of interests in social integrity – insofar as the opportunity for social participation is protected by s. 7 and insofar as creating these opportunities is one purpose of the provision of welfare, deprivation of the opportunity is inherent in the deprivation of the benefit.

Deprivations of psychological integrity are a somewhat different case. The psychological consequences of denial are of course a direct consequence of denial, but it is difficult to assess the gravity of such consequences in quantifiable terms. The courts are developing special techniques for dealing with this particular interest. It seems that where dealing with a form of state action that affects important interests of a large but identifiable group of people, the courts will not be concerned with the actual impairment of this interest on an individual basis, but will in effect deem the interest to be at stake where common sense indicates that it will be at stake in most cases. The Supreme Court has made this move openly in the context of criminal law,[77] and

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75 *Operation Dismantle et al.* v. *The Queen in Right of Canada* (1985), 18 D.L.R. (4th) 481, 491 (S.C.C.).

76 *Morgentaler, supra,* note 27 at 472-3.

77 There is some disagreement as to the precise mode of protection. Lamer J. has suggested that, in the context of a s. 11(b) application, impairment of this security interest should in fact be deemed to avoid problems of proof and the danger of an unacceptable inequality of treatment: see Mills, *supra,* note 55. He affirmed this position in *R.* v. *Rahey* (1987), 33 C.C.C. (3d) 289 (S.C.C.), but it may be noted that LaForest J. (who appears to have been in the majority on this point) was not prepared to treat the infringement as one of psychological security. However, he also indicated that it could be safely assumed in almost all cases, subject to the possibility of calling evidence in particular cases. There does not seem to be any practical difference between these positions.

it can also be seen in the majority treatment of this issue in *Morgentaler*. If such interests are to be protected at all, which the Court seems to have decided in the affirmative, obviously such techniques must be used to put them in a justiciable form.

CONCLUSIONS

For the reasons outlined in this article, I believe that constitutional protection of some aspects of welfare rights can be accommodated within the present state of the law. I would not suggest that constitutionalization of welfare rights would solve the problems of poverty and alienation – while efforts to secure formal legal rights and protections on behalf of the poor and disadvantaged are important and undoubtedly worthwhile, they should always be undertaken in the awareness that such efforts will never, by themselves, eradicate the conditions that make such efforts necessary. Nevertheless, inclusion of some protection of welfare rights in s. 7 of the Charter would be powerful tool for advocates on behalf of recipients whose right to fair and dignified treatment is so often abused and ignored.